

1 J. Noah Hagey, Esq. (SBN: 262331)
2 hagey@braunhagey.com
3 Matthew Borden, Esq. (SBN: 214323)
4 borden@braunhagey.com
5 David H. Kwasniewski, Esq. (SBN: 281985)
6 kwasniewski@braunhagey.com
7 BRAUNHAGEY & BORDEN LLP
8 351 California Street, 10th Floor
9 San Francisco, CA 94104
10 Telephone: (415) 599-0210
11 Facsimile: (415) 599-0210

12 ATTORNEYS FOR PLAINTIFF
13 B&G FOODS NORTH AMERICA, INC.

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

B&G FOOD NORTH AMERICA, INC.,

Plaintiff,

v.

KIM EMBRY and NOAM GLICK, acting in the
purported public interest of the general public of
the State of California,

Defendants.

Case No. 2:20-cv-00526-KJM-DB

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' EX PARTE
APPLICATION TO ENLARGE
BRIEFING ON MOTION TO DISMISS**

Judge: Hon. Kimberly Mueller
Courtroom: 3

1 Plaintiff B&G Foods North America, Inc. (“B&G Foods”) respectfully submits this
 2 Opposition to Defendants’ Ex Parte Application for an Order Permitting Filing of Brief in support
 3 of their Motion to Dismiss Exceeding 20 Pages (Dkt. No. 14).

4 **INTRODUCTION**

5 In this Section 1983 action, Plaintiff B&G Foods seeks to protect its constitutional right not
 6 to be extorted into placing a false cancer warning on its delicious cookie cake products. In
 7 response, Defendants have applied *ex parte* to submit an enlarged and complicated brief hoping to
 8 dismiss the action. That request should be denied because this case is likely to be transferred to the
 9 Northern District of California where lead defendant resides. (*See* Dkt No. 10, B&G Foods’s
 10 Motion to Transfer). That motion is to be heard in a few weeks, on May 15, 2020, more than *two*
 11 *months* before any motion to dismiss would be submitted for argument. Judicial and party
 12 economy thus would be served by delaying any briefing on a motion to dismiss, much less
 13 enlarging that briefing, until after transfer is resolved.

14 Defendants’ Ex Parte Application also fails on the merits because there is no good cause to
 15 submit an overly long brief. (*See* Dkt. No. 3-1 at 3 (“Only in rare instances and for good cause will
 16 the court grant an application to extend page limitations.”)) The entirety of Defendants’ intended
 17 arguments was easily distilled into a nine-minute meet and confer call (Kwasniewski Decl. ¶ 2) and
 18 a single paragraph in their Ex Parte Application (Dkt. No. 14 at 3). Perhaps Defendants intend to
 19 raise new or different arguments requiring greater elocution, but that is not good reason to expend
 20 additional judicial or party resources. The Application should be denied.

21 **BACKGROUND**

22 The Complaint in this matter was filed on March 6, 2020 seeking economic damages under
 23 Section 1983 for Defendants’ abuse of their supposed police powers under Proposition 65 to force
 24 B&G Foods to falsely tell consumers that their cookie cake products cause cancer.

25 **A. B&G Foods’ Pending Transfer Motion**

26 On or about March 11, 2020, B&G Foods was notified that lead defendant Kim Embry
 27 resides in San Francisco. B&G Foods’ undersigned counsel promptly contacted Defendants and
 28 requested consent to transfer this matter to the Northern District of California. (Dkt. No. 10 at 3.)

1 None of the other parties or likely witnesses are based in this District. B&G Foods is based
 2 in New Jersey and represented by San Francisco based counsel; Ms. Embry's co-defendant and her
 3 counsel are based in San Diego; and Ms. Embry has separately sued B&G Foods in Alameda
 4 County Superior Court.

5 Defendants nonetheless objected to transfer, even though none of them or their counsel
 6 reside or have a place of business in this jurisdiction. (*Id.*)

7 On April 6, 2020, B&G Foods filed its pending Transfer Motion (Dkt. No. 10), which is set
 8 to be heard on May 15, 2020.

9 **B. Defendants' Contemplated Motion to Dismiss**

10 Defendants meanwhile have sought to proceed with their motion to dismiss.

11 On April 13, 2020, Defendants met and conferred with B&G Foods regarding their
 12 contemplated motion to dismiss. Defendants summarized all the arguments they intend to raise in
 13 their motion in just nine minutes. (Kwasniewski Decl. ¶ 2.)

14 Pursuant to the Court's order, Defendants' motion to dismiss is to be filed on May 1, 2020
 15 and will be heard on July 24, 2020. (Dkt. No. 7.)

16 **ARGUMENT**

17 The Court need not waste judicial resources considering overly long briefs on a motion to
 18 dismiss that will almost certainly be decided in another forum. Briefing on the motion to dismiss
 19 can easily be delayed without disturbing the hearing date. And Defendants have not demonstrated
 20 they need additional pages to brief the straightforward issues they intend to raise in their motion.

21 **I. THE COURT SHOULD RULE ON PLAINTIFF'S MOTION TO TRANSFER
 22 VENUE BEFORE CONSIDERING ANY MOTION TO DISMISS (OR ENLARGING
 23 THE BRIEFING ON SUCH MOTION)**

24 Courts are encouraged – if not directed – to “avoid a difficult jurisdictional issue ... by
 25 deciding some other, non-merits threshold issue” such as venue. *Bibiano v. Lynch*, 834 F.3d 966,
 26 971 n.4 (9th Cir. 2016) (citing *Trejo-Mejia v. Holder*, 593 F.3d 913, 915 n.2 (9th Cir. 2010)
 27 (avoiding jurisdictional question by transferring the case)); *see also Sinochem Int'l Co. v. Malaysia
 28 Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (“[W]here subject-matter or personal jurisdiction is

1 difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of
 2 dismissal, the court properly takes the less burdensome course.”).

3 According to Defendants, their motion to dismiss will raise “complex[] and num[erous]
 4 legal issues” warranting at least 25-page long briefs. (Dkt. No. 14 at 1.) By contrast, B&G
 5 Foods’s motion to transfer presents a straightforward question: whether a case with no connection
 6 to this District should be litigated here. Indeed, *every* pertinent venue consideration weighs in
 7 favor of transfer. (Dkt. No. 10 at 3-7.) The plaintiff would prefer to litigate in the Northern
 8 District, which is reason enough alone to transfer venue. *L.A. Printex Indus., Inc. v. Le Chateau,*
 9 *Inc.*, 2011 WL 2462025 (C.D. Cal. June 20, 2011). The Northern District is a more convenient
 10 forum for all parties and potential witnesses, none of whom reside or work in the Eastern District.
 11 *See Lexington Ins. Co. v. Maxum Cas. Ins. Co.*, No. 1:17-CV-0423 LJO-BAM, 2017 WL 2654836
 12 *4 (E.D. Cal. June 20, 2017) (“The convenience of witnesses has been called the most powerful
 13 factor governing the decision to transfer a case.”) The case remains in its infancy as the complaint
 14 was filed just over a month ago and Defendants are not due to respond to the complaint for weeks.
 15 *See Printex*, 2011 WL 246025 *4 (transfer favored when case was only six months old). And the
 16 Northern District is much less congested than this court, which is “one of the most congested
 17 dockets in the country.” *Brice v. Cal. Faculty Ass’n*, No. 2:18CV03106MCEEFB, 2019 WL
 18 2053586 *5 (E.D. Cal. May 9, 2019); *see also* (Dkt. No. 3-2 (congestion in the Eastern District has
 19 grown to “a crisis level” with only four active judgeships despite a burgeoning population and an
 20 average weighted caseload “twice the national average”)).

21 Defendants have not articulated any substantive basis for resisting a transfer of venue. Nor
 22 can they, for all the reasons above and in B&G Foods’s motion. The Court should not expend
 23 judicial resources deciding a purportedly complex motion to dismiss when there is a
 24 straightforward and meritorious motion to transfer venue already on file and set for hearing in just a
 25 few weeks that will likely remove this case from the Court’s (congested) docket.

26 At the very least, the Court should delay consideration of Defendants’ motion to dismiss
 27 until after resolving the motion to transfer venue, currently set for hearing on May 15. This could
 28

1 easily be done with a minor adjustment to existing briefing schedule without any need to delay the
 2 July 24, 2020 hearing on the motion to dismiss. For example:

Event	Current Date	Alternative Date
Hearing on Motion to Transfer Venue	May 15, 2020	---
Motion to Dismiss	May 1, 2020	May 20, 2020
Opposition to Motion to Dismiss	June 1, 2020	June 19, 2020
Reply in support of Motion to Dismiss	June 15, 2020	July 3, 2020
Hearing on Motion to Dismiss	July 24, 2020	---

9 Deferring resolution of the motion to dismiss will ensure the issues in this case are considered in an
 10 orderly fashion and will avoid unnecessary consumption of judicial resources. Should the Court be
 11 inclined to delay the briefing in this fashion, B&G Foods would be more than willing to work with
 12 Defendants to devise a proposed amended schedule.

13 **II. DEFENDANTS FAIL TO DEMONSTRATE ANY GOOD CAUSE FOR
 14 SUPERSIZED BRIEFING**

15 The Court made plain at the outset of the case that motions are limited to 20 pages, and
 16 “[o]nly in rare instances and for good cause shown will the court grant an application to extend
 17 these page limitations.” (Dkt. No. 3-1.) Defendants have failed to meet this standard. To the
 18 contrary, Defendants were able to summarize these issues in just nine minutes in a meet and confer
 19 (Kwasniewski Decl. ¶ 2) and describe them in just a single paragraph in their Application (Dkt. No.
 20 14 at 3.)

21 Defendants mostly rely on the fact that in *California Chamber of Commerce v. Becerra*,
 22 2:19-CV-02019-KJM-EFB, 2020 WL 1030980 *2 n.1 (E.D. Cal. Mar. 3, 2020), the Court granted
 23 an Application to submit an overly long reply. That case is very different from this one: it
 24 involved an associational plaintiff representing hundreds of members suing the State of California
 25 for prospective injunctive and declaratory relief, which necessarily invites many complex
 26 jurisdictional questions. In this case, B&G Foods has brought suit solely on its own behalf, seeking
 27 damages under Section 1983 for violations of its constitutional rights caused by the Defendants.
 28

1 Nothing in Defendants' Application explains why *this case* is likely to involve complex issues.
2 This is a separate and independent reason to deny their application.

3 **CONCLUSION**

4 For the foregoing reasons, the Application should be denied.

5
6 Dated: April 21, 2020

Respectfully Submitted,

7 BRAUNHAGEY & BORDEN LLP

8
9 By: s/J. Noah Hagey
J. Noah Hagey

10 Attorneys for Plaintiff
11 B&G FOODS NORTH AMERICA,
INC.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28